In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 928

ELAM REAMUEL TEMPLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an attorney, was convicted of contempt for lying to a judge both orally and in a written statement filed with the court. The court of appeals, while upholding the power of the judge to punish this conduct as contempt, reversed and remanded for a new trial before another judge. 349 F. 2d 116. At the second trial, petitioner was again convicted. On March 31, 1966 he was sentenced as follows (1 R. 75):

> Imposition of prison sentence suspended—$500 fine. It is adjudged that defendant be placed on probation for a period of eighteen months under general conditions as recorded in the Clerk's office; and a special condition that fine be paid under supervision of the Probation Department.

At the time sentence was imposed petitioner's counsel gave notice of an intention to appeal. He asked, and the court agreed, that petitioner be continued on the then existing appearance bond.[1]

No written notice of appeal was filed within the ten-day period specified by Rule 37(a)(2). On April 12, petitioner was directed to submit to the terms of his probation. Without doing so, petitioner filed in the district court a document entitled "petition to appeal", dated April 15, 1966, in which he stated that his counsel had suffered a fall during the course of the trial. He alleged that although counsel had continued

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[1] The colloquy was as follows (2 R. 151-152):

> MR. HINSDALE: We object to the judgment of the Court and give notice of appeal to the Circuit Court of Appeals.
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> THE COURT: All right, sir. Let his notice be . . .
>
> MR. HINSDALE: He is under at the present time $1,000.00 bond. I suppose that would be sufficient.
>
> THE COURT: Yes, sir, appearance bond $1,000.00 accepted.
>
> MR. HINSDALE: Would the present bond—
>
> THE COURT: Yes, sir.
>
> MR. HINSDALE: All right.
>
> THE COURT: He may be released under his present bond.

in the case, the failure to file a notice of appeal was due to the injury (1 R. 76). The district court, on April 25, 1966, ruled that it had no power to enlarge the time for taking an appeal (1 R. 83). Petitioner was thereafter notified to submit to the terms of his probation. On May 3, he was arrested and charged with violation of his probation. After a hearing, the court revoked probation on the ground that petitioner had failed to submit to supervision "after having given written consent to the terms of probation on April 27, 1966." On May 5, 1966, the court imposed a sentence of one year, six months to be served in jail, and six months on probation, with the special condition that petitioner pay the $500 fine under the supervision of the probation department (1 R. 89).

On May 10, 1966, petitioner filed three notices of appeal: (1) from the judgment of March 31, 1966, holding him in contempt (No. 10,653); (2) from the order of April 25, 1966, denying his petition for leave to appeal the original judgment (No. 10,655), and (3) from the sentence imposed on revocation of probation (No. 10,654) (3 R. 2, 88, 50). The government moved to dismiss the first two (3 R. 15-17, 101), but consented to the remand of the revocation proceeding (No. 10,654) for resentencing.[2] The court of appeals dismissed all appeals except that from the judgment of May 5, 1966, on revocation of

[2] Petitioner subsequently filed a notice of appeal from an order of May 30, 1966, denying as untimely a motion for a new trial, filed May 3, 1966, in which petitioner claimed that his attorney had been incapacitated from properly representing him (No. 10,693; 3 R. 162).

probation (No. 10,654). In that proceeding, it remanded for re-sentencing on the ground that the district judge was not permitted under 18 U.S.C. 3651, to impose a fine and to place a defendant on probation since the statute provides for fine *or* imprisonment. It also called the district court's attention to the holding in *Cheff* v. *Schnackenberg*, 384 U.S. 373, that no sentence of more than six months is permissible in the absence of a jury trial.

In this Court, petitioner challenges the ruling of the court below that he did not take a timely appeal from the original judgment of March 31, 1966. He relies upon the oral statement made by his counsel at the time of sentencing. With respect to this contention, the court of appeals said (Pet. 18):

> We do not decide that an oral notice of appeal transcribed into the record would never be sufficient to invoke jurisdiction in the court of appeals. Rather we hold that the case before us does not present a situation in which such notice can be considered adequate. The defendant is an attorney and was represented during the trial by retained counsel. He was free under bond during and after the trial. Furthermore, he had, with assistance of the same counsel who gave oral notice of appeal in the present case, perfected a prior appeal to this court in the same cause. If the Rule is to be applied at all, it should be applied in this case.

This ruling was amply justified in the circumstances of this case. No court has yet held that an oral statement in open court is, in and of itself, a sufficient notice of appeal. The decisions in which the issue

has been presented have been to the contrary. See *Durel* v. *United States*, 299 F. 2d 583 (C.A. 5); *United States* v. *Isabella*, 251 F. 2d 223 (C.A. 2); *Peoples* v. *United States*, 324 F. 2d 689 (C.A. 10). In *Peoples*, this Court (378 U.S. 586) remanded the case to the court of appeals for reconsideration in the light of *Fallen* v. *United States*, 378 U.S. 139. The court of appeals thereafter adhered to its prior decision, 337 F. 2d 91, and this Court denied certiorari, 381 U.S. 916.

On the facts of this case, the oral notice was plainly inadequate. Not only was petitioner represented by counsel, but he was himself an attorney. It is apparent from the history of the case that petitioner took no action until he was actually required to submit to probation. After first being asked to do so on April 12, 1966, he filed his petition for leave to appeal out of time. Although that was denied on April 25, 1966, petitioner did not attempt to perfect his alleged appeal from the original judgment, or even to seek relief in the court of appeals. Nor did he file a timely notice of appeal from that order. Only after petitioner's probation was actually revoked on May 5 did he, on May 10, 1966, finally file a written notice of appeal.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

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